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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 Matthew Musolf and Christopher Dominquez-  
12 Feathers,

13 Plaintiffs,

14 v.

15 NRC Environmental Services, Inc.,

16 Defendant.  
17

No. 2:20-cv-01387-KJM-CKD

ORDER

18 In this action removed from state court, plaintiffs Matthew Musolf and Christopher  
19 Dominguez-Feathers assert defendant NRC Environmental Services, Inc. (NRC ES) committed  
20 seven wage and hour violations. NRC ES moves to compel arbitration of plaintiffs' claims and  
21 dismiss or stay the case pending arbitration. For the following reasons the court **grants** the  
22 motion and stays the proceedings.

23 **I. JUDICIAL NOTICE**

24 NRC ES requests the court take judicial notice of a tentative ruling on the defendant's  
25 motion to compel arbitration in *Sullivan v. National Response Corporation*, No. 2018-00244757  
26 (CA Super. Ct. Sacramento Cty. July 25, 2019), Req. for Judicial Notice Ex. 1, ECF No. 3-4,<sup>1</sup> and

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<sup>1</sup> For clarity, in the court's citations to the tentative ruling in *Sullivan v. National Response Corporation* the court will use page numbers generated by the court's CM/ECF system.

1 the ruling in *Reynolds v. NRC Envtl. Servs. Inc.*, No. 20-5262, 2020 WL 6083112 (C.D. Cal.  
2 Aug. 24, 2020), Suppl. Req. for Judicial Notice Ex. 3, ECF 9-2. The documents “can be  
3 accurately and readily determined” by a source “whose accuracy cannot reasonably be  
4 questioned.” *See* Fed. R. Evid. 201(b). Therefore, the request is **granted**.

## 5 **II. BACKGROUND**

6 National Response Corporation (NRC) is the parent company of National Response  
7 Corporation Payroll Management, LLC (NRC PM) and NRC ES. Kallunki Decl. ¶ 4, ECF No. 3-  
8 2. NRC PM employed both plaintiffs. *Id.* ¶ 4. All NRC entities utilize UltiPro, a human  
9 resources portal each employee accesses with a unique username and password. *Id.* ¶¶ 4–6.  
10 New employees use UltiPro “to review and acknowledge various policies . . . and engage in other  
11 activities as part of the onboarding process.” Mem. at 7, , ECF No. 3-1 (citing Kallunki Decl.  
12 ¶¶ 4–6). On April 1, 2016, Dominguez-Feathers completed his onboarding paperwork. *Id.*;  
13 Opp’n 2–3, ECF No. 6. On May 23, 2017, Musolf did the same. Mem. at 7; Opp’n 2–3.

14 NRC ES contends human resources sent both plaintiffs a welcome email, to which the  
15 arbitration agreement entitled “Employee Acknowledgement and Arbitration Agreement”  
16 (Agreement) was attached. Agreement, Kallunki Decl. Ex. A–B, ECF No. 3-2. Dominuez-  
17 Feathers does not recall receiving the welcome email. Dominguez-Feathers Decl. ¶¶ 3–4, ECF  
18 No. 6-1. Musolf claims he never received the Agreement, Musolf Decl. ¶ 4, ECF No. 6-2, but  
19 also admits he did not read all the documents he received before starting work, *id.* ¶ 8. In the  
20 UltiPro portal, each plaintiff applied an electronic signature to the “Policies and Procedures  
21 Acknowledgment Form” (Acknowledgment). Acknowledgment, Kallunki Decl. Ex. C, ECF No.  
22 3-2. The Acknowledgment states: “I hereby acknowledge that I have received a copy of the NRC  
23 Employee Handbook Acknowledgement and Agreement form. I hereby attest that I have read,  
24 understand and agree to be legally bound to the terms contained in it.” *Id.*

25 In their complaint, initially filed in state court, plaintiffs brought claims for (1) Unfair  
26 Competition; (2) Failure to Provide Meal Periods; (3) Failure to Provide Rest Periods; (4) Failure  
27 to Pay Overtime Wages; (5) Waiting Time Penalties; and (6) Wage Statement Penalties. Notice  
28 of Removal ¶ 25, ECF No. 1; Compl. ¶¶ 24–59, Low Decl. Ex. 1, ECF No. 1-2. Musolf also

1 asserted a violation of California’s Private Attorneys General Act (“PAGA”). Compl. ¶ 60–64.  
2 On July 9, 2020, NRC ES removed the action to this court. Notice of Removal, ECF No. 1.

3 NRC ES now moves to compel arbitration and dismiss or stay the action. Mot., ECF No.  
4 3; Mem., ECF No. 3-1; Reply, ECF No. 9. Plaintiffs oppose, Opp’n, ECF No. 6, and the court  
5 submitted the matter without a hearing, Minute Order, ECF No. 7.

### 6 **III. LEGAL STANDARD**

7 “Generally, in deciding whether to compel arbitration, a court must determine two  
8 ‘gateway’ issues: (1) whether there is an agreement to arbitrate between the parties; and  
9 (2) whether the agreement covers the dispute.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th  
10 Cir. 2015) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). The party  
11 moving to compel arbitration bears the burden of showing each of these elements by a  
12 preponderance of the evidence. *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th  
13 Cir. 2015); *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). “A court may  
14 invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or  
15 unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their  
16 meaning from the fact that an agreement to arbitrate is at issue.’” *Kindred Nursing Ctrs. Ltd.*  
17 *P’hip v. Clark*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1421, 1426 (2017) (quoting *AT & T Mobility LLC v.*  
18 *Concepcion*, 563 U.S. 333, 339 (2011)).

### 19 **IV. ANALYSIS**

20 First, in turning to whether the Agreement here is binding, the court notes the same form  
21 of agreement’s incorporation by reference in an acknowledgment, and the method by which  
22 plaintiffs applied their electronic signatures to the acknowledgment, have all been found valid and  
23 enforceable by a judge of the Sacramento County Superior Court, Tentative Ruling in *Sullivan*,  
24 No. 2018-00244757, at 9–10, and one court in this circuit. *Reynolds*, 2020 WL 6083112, at \*6–7.  
25 Having reviewed these decisions, the court agrees with their reasoning and finds the Agreement  
26 here exists and is binding. The court also agrees with both courts’ findings that the Agreement is  
27 not unconscionable. *Reynolds*, 2020 WL 6083112, at \*3, \*6–8 (finding agreement with the same  
28 provisions as here and entered in same way as plaintiffs here is neither procedurally nor

1 substantively unconscionable under California contract law); Tentative Ruling in *Sullivan*, No.  
2 2018-00244757, at 9 (finding agreement meets the requirements of *Armendariz v. Foundation*  
3 *Health Psychcare Servs., Inc.*, 24 Cal.4th 83 (2000), the California Supreme Court case  
4 establishing minimum requirements for enforceable employment arbitration agreements).  
5 Adopting the reasoning of these opinions, the court finds the Agreement here is not  
6 unconscionable.

7         Second, the Agreement covers the dispute in question, as it covers “all disputes that may  
8 arise out of or be related in any way to [plaintiff’s] employment, including but not limited to . . .  
9 compensation.” Agreement at 1. However, plaintiffs argue Musolf’s representative PAGA claim  
10 is exempt from the arbitration agreement and the action should therefore be stayed. Opp’n at 9.  
11 There is no express PAGA waiver in the Agreement; rather the Agreement generally exempts  
12 “claims that are not subject to arbitration under current law,” which would include PAGA claims.  
13 Agreement at 1; *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 388 (2014) (PAGA  
14 waivers are unenforceable). Through his PAGA claim, Musolf seeks “all applicable penalties, on  
15 behalf of himself and similarly situated employees, that may be recovered in addition to other  
16 damages pursuant to Labor Code § 2699 et seq.” Compl. ¶ 64 & Prayer (seeking unpaid wages).  
17 NRC ES avers the PAGA claim is subject to individual arbitration because Musolf seeks unpaid  
18 wages by virtue of this claim. Reply at 11.

19         “[N]otwithstanding the language of § 3, a district court may either stay the action or  
20 dismiss it outright when . . . the court determines that all of the claims raised in the action are  
21 subject to arbitration.” *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1074 (9th Cir.  
22 2014). Under *Iskanian v. CLS Transportation Los Angeles, LLC*, PAGA claims are not arbitrable  
23 as claims “that can only be brought by the state or its representatives, where any resulting  
24 judgment is binding on the state and any monetary penalties largely go to state coffers.”  
25 59 Cal. 4th at 388. At the same time, “not all statutory remedies for Labor Code violations are  
26 ‘civil penalties’ recoverable in an employee’s PAGA action.” *ZB, N.A. v. Superior Ct.*, 8 Cal.  
27 5th 175, 185 (2019). While claims for PAGA civil penalties are not subject to arbitration, claims  
28 for unpaid wages are because they are recoverable through private, individual civil action.

1 *Mandviwala v. Five Star Quality Care, Inc.*, 723 F. App'x 415, 417 (9th Cir. 2018) (unpublished)  
2 (citing *Iskanian*, 59 Cal. 4th at 388); *ZB, N.A.*, 8 Cal. 5th at 188 (“[A] close, contextual analysis  
3 of the statutory scheme reveals that the amount for unpaid wages referenced in section 558 is not  
4 part of that section’s civil penalty and is not recoverable through a PAGA action. Instead . . . this  
5 part of a section 558 citation represents compensatory damages.”). Because unpaid wages are not  
6 included in the civil penalties a party may obtain through PAGA, *ZB, N.A.*, 8 Cal. 5th at 182,  
7 Musolf’s claim for unpaid wages is subject to arbitration. However, the portion of his PAGA  
8 claim seeking civil penalties is not arbitrable. Given the entanglement of the non-arbitrable  
9 PAGA claim for civil penalties with the other claims for damages, including in part a portion of  
10 the PAGA claim, the court stays the entire action here in the interests of efficiency, pending  
11 completion of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,  
12 20 n.22 (1983) (“In some cases, of course, it may be advisable to stay litigation among the non-  
13 arbitrating parties pending the outcome of the arbitration. That decision is one left to the district  
14 court . . . as a matter of its discretion to control its docket.”); Opp’n at 9 (agreeing “Musolf’s  
15 PAGA claim must be stayed pending resolution of Musolf’s non-PAGA claims if the court  
16 compels Musolf to arbitrate his individual claims”).

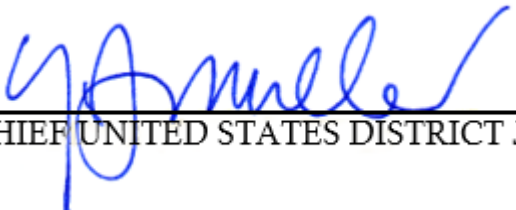
17 **V. CONCLUSION**

18 The court **grants** the motion to compel arbitration and stays this case pending completion  
19 of arbitration. The parties shall notify the court within seven (7) days of completing arbitration.  
20 Accordingly, the Status (Pretrial Scheduling) Conference set for May 6, 2021 is vacated.

21 This order resolves ECF No. 3.

22 IT IS SO ORDERED.

23 DATED: April 28, 2021.

  
CHIEF UNITED STATES DISTRICT JUDGE